Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:FS:LI:POSTF-163074-01
HNAdams

date: November 27, 2001

to: Large & Mid Size Business Division
Territory Manager (Heavy Manufacturing, Construction & Transportation)
Attn: Ronald Whitford, Group 1656

from: Associate Area Counsel (Financial Services)
CC:LM:FS:LI

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subject: [redacted], LP - Section 6231(g) Issue

U.I.L. No. 6231.00-00

This memorandum responds to your request for assistance dated November 7, 2001. This memorandum should not be cited as precedent.

FACTS

For purposes of this response, we understand the facts are as follows.[1/] [redacted] is a limited partnership that was formed in [redacted] filed partnership returns for each of the years [redacted], and [redacted]. [redacted] had [redacted] partners during each of those years: general partner [redacted] and limited partner [redacted] (both subsidiaries of [redacted] and members of the [redacted] consolidated group) and limited partner [redacted] (a member of the [redacted] consolidated group). The [redacted] Forms K-1 for each of those entities listed "corporation" after the question "What type of entity is this partner?" The members of the examination team were aware at all times relevant hereto that each of those three entities was a C corporation.

[redacted] was a partnership within the meaning of Code section 6231(a)(1) for the years [redacted], and [redacted]. Because its partners were corporations, [redacted] did not qualify as a small partnership within the meaning of section 6231(a)(1)(B)(i) for those years. Section 1234(a) of the Taxpayer Relief Act of 1997,

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[1] Our understanding of the facts is based on information we have received from you.

P.L. 105-34, extended the definition of small partnership for partnership years ended after August 5, 1997 to include partnerships that had 10 or fewer partners, each of whom is an individual (other than a nonresident alien), a C corporation, or an estate of a deceased partner. As each of its 3 partners was a C corporation, [redacted] qualified as a small partnership within the meaning of section 6231(a)(1)(B)(i) for 1997.

[redacted] responded yes on its [redacted] return to question 4 of schedule B which asks "Is this partnership subject to the consolidated audit procedures of sections 6221 through 6233?" In addition, [redacted] designated [redacted] as its TMP on its [redacted] return by listing [redacted] under the heading "Enter below the general partner designated as the tax matters partner (TMP) for the tax year of this return." [redacted] (b)(5)(AC) [redacted] (b)(5)(AC) [redacted] (b)(5)(AC) [redacted]. However, [redacted] has not filed an election pursuant to section 6231(a)(1)(B)(ii) and Treas. Reg. section 301.6231(a)(1)-1T(b)(2) to have the TEFRA partnership provisions) apply to [redacted]. [redacted] filed no document purporting to be such an election either with its [redacted] return or separate from its [redacted] return. [redacted] (b)(5)(AC) [redacted] (b)(5)(AC) [redacted] (b)(5)(AC) [redacted].

The Service is examining [redacted]'s [redacted], [redacted], [redacted], [redacted], and [redacted] years. The examination relates to the issue of whether income that was allocated to [redacted] is properly reportable by one or both of the [redacted]-affiliated partners. In late [redacted] or early [redacted], the Service prepared a Form 872-P purporting to extend through [redacted] the period within which the service may assess tax attributable to partnership items of [redacted] for [redacted], [redacted], [redacted], and [redacted]. That Form 872-P was executed on behalf of [redacted] on the line indicating "Tax Matters Partner Sign Here" on [redacted]. That form was then executed on behalf of the Service on [redacted]. The Service has not given [redacted]'s partners notice of beginning of administrative proceedings relating to [redacted] pursuant to Code section 6223 or otherwise treated [redacted] as a TEFRA entity for [redacted].

The Service has protected, and will continue to protect, its ability to assess and collect deficiencies that result from a determination that income of [redacted] that was allocated to [redacted] in [redacted] is properly reportable by one or both of the [redacted]-affiliated partners by obtaining consents to

extend the period provided under Code section 6501 covering the [redacted] year of those partners.

ISSUE

Can the Service be required by Code section 6231(g) to treat [redacted] as a TEFRA entity for [redacted] (b)(7)a [redacted] (b)(7)a [redacted] (b)(7)a [redacted]?

CONCLUSION

The Service is not required to treat [redacted] as a TEFRA entity for [redacted].

ANALYSIS

Subchapter C of Chapter 63 of Internal Revenue Code Subtitle A (Code sections 6221-34 - the TEFRA partnership provisions) provides unified audit rules applicable to partnerships. Code section 6221 provides that the tax treatment of a "partnership item" shall be determined at the partnership level, Code section 6231(a)(3) defines partnership item as certain items of "a partnership," and Code section 6231(a)(1)(B) defines "partnership," in relevant part, as an entity required to file a return under Code section 6031(a) with the exception relevant here that:

> The term "partnership" shall not include any partnership having 10 or fewer partners each of whom is an individual (other than a nonresident alien, a C corporation, or an estate of a deceased partner.

Based on that exception, the examination team believes that [redacted] was not a partnership within the meaning of Code section 6231(a)(1)(B) for [redacted]. However, the examination team is concerned that it might be required by Code section 6231(g) to treat [redacted] as a TEFRA entity for [redacted] as a result of having listed [redacted] on the Form 872-P that was executed on behalf of the Service on [redacted].

Code section 6231(g) provides that:

> (1) Determination that subchapter applies. If, on the basis of a partnership return for a taxable year, the Secretary reasonably determines that this subchapter applies to such partnership for such year but such determination is erroneous, then the provisions of this subchapter are hereby

extended to such partnership (and its items) for such taxable year and to partners of such partnership.

(2) Determination that subchapter does not apply. If, on the basis of a partnership return for a taxable year, the Secretary reasonably determines that this subchapter does not apply to such partnership for such year but such determination is erroneous, then the provisions of this subchapter shall not apply to such partnership (and its items) for such taxable year or to partners of such partnership.

Code section 6231(g) was added to the Code in 1997 by section 1232 of the Taxpayer Relief Act of 1997. The legislative history of section 1232 explains the reason for the change as follows:

> The IRS often finds it difficult to determine whether to follow the TEFRA partnership procedures or the regular deficiency procedures. If the IRS determines that there were fewer than 10 partners in the partnership but was unaware that one of the partners was a nonresident alien or that there was a special allocation made during the year, the IRS might inadvertently apply the wrong procedures and possibly jeopardize any assessment. Permitting the IRS to rely on a partnership's return would simplify the IRS' task.

H.R. Rep. No. 105-148, at 587-88, reprinted in 1997-4 C.B. 909-10. (Emphasis added.)

The legislative history explains section 1232 as follows:

> The bill permits the IRS to apply the TEFRA audit procedures if, based on the partnership's return for the year, the IRS reasonably determines that those procedures should apply. Similarly, he provision permits the IRS to apply the normal deficiency procedures if, based on the partnership's return for the year, the IRS reasonably determines that those procedures should apply.

H.R. Rep. No. 105-148, at 588, reprinted in 1997-4 C.B. 910. (Emphasis added.)

Based on the foregoing, we do not believe that the Service is required to treat [redacted] as a TEFRA entity for [redacted]. We believe that the legislative history supports the view that section 6231(g) permits, but does not require, the Service to rely on partnership returns in making a determination of whether an entity is a TEFRA

entity for a year. The legislative history contains no indication that the section was intended to do anything but protect the Service's ability to assess deficiencies in the event it inadvertently makes an incorrect determination regarding whether the TEFRA provisions apply. There is no indication in the legislative history that the section was intended to grant taxpayers an affirmative right to require the Service to treat an entity as subject to TEFRA particularly where, as here, an examination team believes the entity is not subject to TEFRA.

This opinion is based on the facts set forth herein. It might change if the facts are determined to be incorrect or if additional facts are developed. If the facts are determined to be incorrect or if additional facts are developed, this opinion should not be relied upon. You should be aware that, under routine procedures that have been established for opinions of this type, we have referred this memorandum to the Office of Chief Counsel for review. That review might result in modifications to the conclusions herein. We will inform you of the result of the review as soon as we hear from that office. In the meantime, the conclusions reached in this opinion should be considered to be only preliminary. If we can be of further assistance, you may call the undersigned at (516) 688-1737.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse affect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

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By: _____
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